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10 UNITED STATES DISTRICT COURT
11
12 NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION

14 SPY PHONE LABS LLC,
Plaintiff,

15 v.

16 GOOGLE INC., ANDREI CIUCA, d/b/a
17 CAD DESIGN, and JOHN DOES 1-49,
18 Defendants.

Case No.: 5:15-CV-03756-KAW

**PLAINTIFF SPY PHONE LABS LLC'S
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS THE SECOND
AMENDED COMPLAINT**

Hearing Date: October 6, 2016
Time: 11:00 am
Judge: Honorable Kandis A. Westmore
Location: U.S. District Courthouse
1301 Clay Street
Oakland, CA 94612

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF FACTS

Plaintiff Spy Phone Labs LLC (“Plaintiff”) submits this memorandum and points of authorities in opposition to the motion to dismiss Plaintiff’s Second Amended Complaint (“SAC”) filed by defendant Google, Inc. (“Google”).¹

Google’s contention that the SAC contains “precisely the same facts” as the amended complaint (“AC”) that this Court previously dismissed with leave to amend is nothing other than wishful thinking. Undoubtedly, Google would love to make this case go away at the pleadings stage and avoid discovery on the unlawful practices of Google and its employees alleged in the SAC. Plaintiff, however, has pled sufficient facts as to each of its claims to withstand Google’s motion to dismiss.

The Court is respectfully referred to the SAC for a full statement of the allegations against all defendants. The SAC plausibly describes how and why Google, its employees, and other developers of software applications for mobile phones (“apps”) that compete with Plaintiff have gone to great lengths to unlawfully prevent Plaintiff from using its federally registered trademark SPY PHONE® and destroy what was once an exceedingly profitable business. A summary of the key events and transactions alleged in the SAC that are relevant to this motion are described below.

Prior to defendants’ unlawful conduct, Plaintiff was using its mark to brand and market an app that parents could use to monitor the activities of their children on a mobile device (“Plaintiff’s App”) on Google Play, Google’s online marketplace for apps that run on the Android® operating system. (SAC ¶¶ 13-20, 37-47.) To prevent others from infringing on its trademark and associated

¹ By separate motion filed herewith, Plaintiff seeks leave to supplement the SAC pursuant to Fed. R. Civ. P. 15(d) to add new claims based on events that have occurred after the filing of the SAC. Some of these recent events are described below and referenced in the Declaration of Dan Parisi as they are pertinent to this motion.

1 good will, starting around November 2012, Plaintiff routinely submitted trademark complaints using
2 Google's online complaint form requesting that Google remove apps that were listed on Google Play
3 with names that copied or incorporated Plaintiff's mark. (SAC ¶ 68.) For several months, Google
4 complied with these requests by removing the infringing apps, although, unlike other online services,
5 Google would often allow the infringing app to remain listed on Google Play for days and even weeks
6 before the app was removed. (SAC ¶¶ 71, 75-76.) Due in large part to its foresight in obtaining and
7 registering the mark and its enforcement of its rights in that mark, Plaintiff's App, marketed under
8 the SPY PHONE® brand, routinely appeared as the top-ranked app in consumer searches for parental
9 monitoring apps, which was critical to the success of Plaintiff's business. (SAC ¶¶ 17-20, 61-63.)
10 Plaintiff achieved its valuable high ranking naturally or organically, i.e., without paying Google for
11 "key words" or other advertising add-ons for which Google charges a fee.²
12

13 Plaintiff's success apparently irked both its competitors, who were losing business to
14 Plaintiff, and Google, who was generating less profit from Plaintiff's App because Plaintiff was able
15 to succeed with paying Google additional fees. The developers responded by filing false complaints
16 about Plaintiff's App, describing Plaintiff's App as "spyware" which is prohibited from being listed
17 on Google Play under Google's developer rules ("Developer Program Policies") as incorporated into
18 the Developer Distribution Agreement ("DDA") that all app developers are required to sign to list
19 apps on Google Play. (SAC ¶¶ 21-27, 86-94.) Google, acting through employees, some of whom
20 Plaintiff has alleged (based on information received from a Google insider) have financial
21 relationships with some of Plaintiffs' competitors, responded by removing Plaintiff's App from
22
23

24 ² As described in the SAC, an organic or natural search result is generated using an algorithm
25 contained in a search engine, which ranks the located apps in order of relevance. (SAC ¶ 17.)
26 Alternatively, to obtain a high search result ranking, a person can purchase "keywords" from Google,
27 which gives the listing associated with the keywords priority placement ahead of the natural search
28 results. See Google Inc. v. Am. Blind & Wallpaper, No. C 03-5340JF(RS), 2007 WL 1159950, at
*3 (N.D. Cal. Apr. 18, 2007).

1 Google Play and suspending Plaintiff's developer account. (SAC ¶¶ 86-94, 146-151.) Plaintiff has
2 alleged that Google knew the complaints were false and that there was no justification for taking
3 down Plaintiff's App and suspending its account. (SAC ¶¶ 90-94.) These actions by Google caused
4 Plaintiff to suffer losses of tens of thousands of dollars per month. (SAC ¶¶ 53-54, 61.)

5 Plaintiff's online appeal of its suspension fell on deaf ears. (SAC ¶¶ 95-98.) When Plaintiff
6 was finally able to speak to a live person at Google (which was accomplished only by filing an earlier
7 federal lawsuit), Google conceded that Plaintiff's App was not spyware and that none of its functions
8 or features warranted its removal from Google Play or the suspension of Plaintiff's developer
9 account. (SAC ¶¶ 99-101.) As a condition of reinstatement, however, Google informed Plaintiff
10 that it could not market Plaintiff's App under a name that contained the word "spy," because,
11 according to Google, the word "spy" is "misleading" because it falsely "represent[s] the product as
12 being spyware and/or capable of surreptitious tracking." This condition imposed by Google
13 precluded Plaintiff from using its federally registered mark to identify Plaintiff's App. (SAC ¶¶ 102-
14 105.)
15

16 While Plaintiff had no choice in being forced to accept this condition, Google continued to
17 allow other competing app developers to market their apps – including parental monitoring apps that
18 competed directly with Plaintiff's App – using the word "spy" in the name, including names that
19 copied Plaintiff's mark. (SAC ¶¶ 105-107, 114-119.) Plaintiff has alleged that Google had actual
20 and/or constructive knowledge of apps that infringed on Plaintiff's mark, but either took no action or
21 allowed the infringement to continue for weeks until any action was taken. (SAC ¶¶ 184-186.)
22 Among the evidence described in the SAC to support Plaintiff's claim that Google was aware of
23 others' infringement on Plaintiff mark is an unsolicited letter that Plaintiff received from someone
24 who identified him/herself as a Google employee, who unequivocally confirmed that Google's
25 employees, because of a financial relationship between the employees and the developers, allowed
26 Plaintiff's competitors to continue to offer their apps on Google Play despite full knowledge that
27
28

1 these developers were infringing on Plaintiff's mark, and that there was no justification to remove
 2 Plaintiff's App from Google Play or to prevent Plaintiff from using its trademark. (SAC ¶¶ 146-151
 3 and Exhibit 4.)

4 The full breadth of Google's plan and its motivation to act as it has against Plaintiff has just
 5 recently come into focus and, these recent revelations form the basis for Plaintiff's simultaneously
 6 filed request for leave to supplement its SAC.³ Starting in May 2016, Google began selling the
 7 keywords "spy phone" to the highest bidder. What this means is that when a consumer inputs the
 8 search term SPY PHONE® into the search bar on Google Play, the app listing associated with the
 9 high-bidder (almost always a direct competitor of Plaintiff's) will appear first on the search result
 10 screen ahead of all other apps that match the search term "spy phone." (See Parisi Decl. Exh. 1.) In
 11 other words, while Google has prevented Plaintiff from using its trademark to obtain an organic top-
 12 ranking because, in Google's own words, an app with the word "spy" in the title is "misleading"
 13 because it implies that the app is "spyware and/or capable of surreptitious tracking" (SAC ¶ 102),
 14 Google is now selling keywords that are Plaintiff's mark to developers who wish to achieve a top-
 15 ranking. Not only does this constitute unfair competition by Google, which is the subject a new
 16 cause of action that Plaintiff seeks to add via its motion to supplement, but, as relevant to this motion,
 17 it demonstrates Google's bad faith and abuse in enforcing the DDA and its Developer Program
 18 Policies.
 19
 20

21 For the reasons described below, Google's conduct, as summarized above and detailed in the
 22 SAC, are sufficient to impose liability for contributory trademark infringement, tortious interference
 23 with contract, breach of the covenant of good faith and fair dealing, tortious interference with
 24 prospective economic advantage and under California Business & Professions Code § 17200
 25 (California's "Unfair Competition Law" or "UCL").
 26

27
 28 ³ The Court is respectfully referred to the accompanying declaration of Dan Parisi, dated July 14, 2016 ("Parisi Decl.") for a statement of the facts that relate to this motion.

II. PROCEDURAL HISTORY

This action was initially filed in the U.S. District Court for the District of New Jersey. Google moved to transfer the action to this Court pursuant to 28 U.S.C. § 1404 based on a forum selection clause in Google's DDA or, in the alternative, to dismiss the second and third causes of action in the AC for failure to state a claim. On August 13, 2015, the New Jersey District Court granted the part of the motion requesting the transfer without ruling on Google's motion to dismiss. Upon transfer, this action was assigned to Magistrate Paul S. Grewal and Google renewed its motion to dismiss the AC. Magistrate Grewal, in an Order dated March 21, 2016 ("Order") granted Google's motion to dismiss, but also granted Plaintiff leave to file its SAC. Plaintiff filed its SAC on April 11, 2016. Google moved to dismiss the SAC on May 25, 2016.

III. ARGUMENT

A. THE SAC STATES A CLAIM AGAINST GOOGLE FOR CONTRIBUTORY TRADEMARK INFRINGEMENT

One who continues to supply its services to known trademark infringers can be held liable for contributory trademark infringement under the Lanham Act. Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc., 658 F.3d 936, 942 (9th Cir. 2011); Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 106 (2d Cir. 2010); Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 984 (9th Cir. 1999). To state such a claim, the plaintiff must allege facts that, if proven, would establish, inter alia, that the defendant continued to provide services with actual knowledge of trademark infringement or with "willful blindness" to the infringement, i.e., the defendant looked the other way despite "reason to suspect that users of its service are infringing a protected mark." Acad. of Motion Picture Arts & Scis. v. GoDaddy.com, Inc., No. CV 10-03738 AB (CWX), 2015 WL 5311085, at *34 (C.D. Cal. Sept. 10, 2015) (quoting Tiffany, 600 F. 3d at 109-110); accord, Philip Morris USA Inc. v. Liu, 489 F. Supp. 2d 1119, 1123 (C.D. Cal. 2007) ("Willfulness can be established by evidence of knowing conduct or by evidence that the defendant acted with 'an aura of indifference to plaintiff's

rights”); Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc., 955 F.2d 1143, 1149 (7th Cir. 1992) (“willful blindness is equivalent to actual knowledge for purposes of the Lanham Act”).

In dismissing the AC with leave to amend, Magistrate Grewal found that Plaintiff had not alleged facts that, if proven, would establish that Google had actual notice of infringement by others on Plaintiff’s mark. (Order at 7-8.)⁴ Google’s characterizes Plaintiff’s amended trademark claim in the SAC as “unchanged” from the version that appeared in the AC. (Google’s Memo of Points and Authorities (“Mov. Br.”) at 3.) For the following reasons, Google is wrong and its motion should be denied.

First, the SAC clarifies that Plaintiff’s claim for contributory infringement rests not just on Google’s failure to act, but on Google’s failure to act promptly to suspend its services to known infringers of Plaintiff’s mark. Google seems to suggest that it can avoid liability for contributory trademark infringement simply because it did not ignore any specific trademark complaint, irrespective of the timing or nature of Google’s response. (Mov. Br. at 3-6.)⁵ There is no legal authority that grants Google such leeway to avoid liability. Just like the owner of a flea market who receives a complaint about a vendor selling counterfeit designer handbags but allows these unlawful sales to continue for weeks before shutting the vendor down, Plaintiff seeks to hold Google liable not just for failing to act, but for continuing to supply services to known infringers for extended periods of time after receiving specific complaints. Cf., Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc., 907 F. Supp. 1361, 1375 (N.D. Cal. 1995) (provider of electronic bulletin

⁴ Although Magistrate Grewal observed that a service provider could be held liable for contributory trademark infringement if it supplies services with “reason to know” of trademark infringement by others (Order at 7), the Order did not contain any discussion of why the Court did not accept the allegations in the AC that Google was “willfully blind” to ongoing infringement, and instead concluded that the AC only alleged “generalized knowledge” of infringement. (Id.)

⁵ E.g., Mov. Br. at 3 (“Absent inaction in the face of [] express notice, internet marketplaces are not liable for contributory trademark infringement”); Mov. Br. at 4 (“Google did not ignore any specific trademark complaint submitted by [Plaintiff] . . .”).

board service may be liable for contributory copyright infringement if it is shown that it could take simple measures to prevent further damage to plaintiffs' copyrighted works, but instead continued to allow infringing posts for an extended time after receiving notice of infringement).

Plaintiff's theory is amply supported by Tiffany, a decision on which Google heavily relies. (Mov. Br. at 3, 4.) In Tiffany, the Second Circuit affirmed the district court's holding that eBay could not be held liable for contributory infringement by relying, in part, on undisputed evidence showing the eBay "**promptly** removed all listings that Tiffany challenged as counterfeit," 600 F.3d at 106 (emphasis added), with most removals having occurred within 12 hours of a complaint being received and the remainder removed within 24 hours. Id. at 99.⁶ A similar result was reached in Acad. of Motion Picture Arts & Scis., where the district court, in dismissing a claim for contributory trademark infringement against GoDaddy, cited the presence of "a robust Trademark Protection Policy, which included a VIP program for brandowners with frequent concerns of potential infringement" that resulted in all trademark complaints being resolved within an average of 2.75 days from receipt of the complaint, and most being resolved within one business day. 2015 WL 5311085, at *10, *31. Cf., 17 U.S.C. § 512(c) & (d) (providing safe harbor under DMCA for an online service provider that "acts expeditiously to remove" the infringing material"); Wolk v. Kodak Imaging Network, Inc., 840 F. Supp. 2d 724, 733 (S.D.N.Y. 2012) (photo storage service qualified for DMCA safe-harbor protection where it removed the alleged infringing images on the same day notice was received), aff'd, 569 F. App'x 51 (2d Cir. 2014).

⁶ While Tiffany is illuminating on some of the legal issues raised here, it must be remembered that Tiffany was decided following both full discovery and a bench trial, during which evidence of what eBay's employees knew and did not know was explored extensively. It should not and cannot be assumed that Google's conduct here was as vigilant as eBay's conduct in Tiffany. See Rosetta Stone, Ltd. v. Google, Inc., 676 F.3d 144, 164 (4th Cir. 2012) (criticizing the district court's "heavy reliance" on Tiffany in deciding a motion for summary judgment because Tiffany was decided on appeal following a "lengthy bench trial").

1 In sharp contrast to the prompt action taken to address infringement complaints by the online
2 service providers described above, the SAC alleges that Google typically took weeks to respond to
3 Plaintiff's infringement complaints. In arguing that the SAC is "unchanged" from the AC, Google
4 ignores these new allegations in the SAC describing how Google received actual notice of
5 infringement via an online complaint form, but continued to allow these infringing apps to remain
6 on Google Play for extended periods of time. Although the full scope of this conduct can only be
7 revealed through discovery, the SAC identifies two specific instances of unexplained and unjustified
8 delays by Google in taking any action against known infringers: (1) after Plaintiff submitted a
9 trademark complaint using Google's standard complaint form on May 17, 2013, it took 27 days for
10 the Google Play Team to remove the infringing app (SAC ¶ 76); and (2) after Plaintiff identified an
11 infringing app in its AC on January 23, 2015, Google did not remove that app until 18 days later
12 (SAC ¶ 155). In the time between these notices and Google's takedowns, Google "continue[d] to
13 supply its [services] to one whom it knows or has reason to know is engaging in trademark
14 infringement." Tiffany, 600 F.3d at 106 (Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 854
15 (1982)). The fact that Google may have eventually removed these and other infringing apps from
16 Google Play does not, by itself, entitle Google to dismissal of the contributory infringement claim.
17 Spy Optic, Inc. v. Alibaba.Com, Inc., No. CV1500659BROJCX, 2015 WL 7303763, at *6 (C.D. Cal.
18 Sept. 28, 2015) (denying motion to dismiss cause of action for contributory trademark infringement
19 because, while defendant had shut down many infringing vendors in response to trademark
20 complaints, "on at least one occasion, defendant has allowed an infringer, . . . to continue to use its
21 websites to post multiple infringing products, even after Plaintiff alerted Defendant" about the
22 infringement). At a minimum, Plaintiff should be permitted to explore why it took Google so long
23 to act on these specific infringement complaints (as well as others likely to be identified in discovery)
24 and have the Court or a jury decide whether Google's conduct is culpable.
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1 The new allegations in the SAC also clarify why Google's failure to take down Reptilicus.net
 2 Brutal Spy Phone creates a separate basis for holding Google liable for contributory trademark
 3 infringement. (SAC ¶¶ 84-85.) As described in the SAC, during the period from approximately
 4 November 2012 – June 24, 2013, Google eventually responded to Plaintiff's trademark complaint
 5 and removed all apps with titles that contained Plaintiff's SPY PHONE® mark. (SAC ¶¶ 68-71, 75-
 6 77.) On June 24, 2013, Plaintiff submitted a trademark infringement complaint directed at an app
 7 marketed under the name Reptilicus.net Brutal Spy Phone. (SAC ¶¶ 84.) Although the Google Play
 8 Team had previously taken down apps with similarly infringing names – such "Galyum Spy Phone"
 9 – on this occasion, which incurred within days of Plaintiff's initial interaction with defendant Ciuca
 10 and the date that Google began taking unjustified punitive action against Plaintiff, Google informed
 11 Plaintiff that it would take no action:

13 As a preliminary matter, please note that Google is not in a position to mediate trademark
 14 disputes between developers and trademark owners. As a courtesy we have considered your
 15 claim, but are unable to determine its merits at this time.

16 (SAC ¶ 85.)

17 In moving to dismiss the SAC, Google renews the argument made in support of its motion to
 18 dismiss the AC, and seemingly accepted by Magistrate Grewal, that the mere fact that Google
 19 responded to the complaint, regardless of the outcome or any ulterior motivation, is sufficient for
 20 Google to avoid liability for contributory trademark infringement. (Mov. Br. at 3-5.)⁷ But none of
 21

22
 23 ⁷ In concluding that Google had not done anything to warrant imposing liability for its failure to
 24 remove Reptilicus.net Brutal Spy Phone from Google Play, Magistrate Grewal found that it was
 25 enough that "Google did not ignore that notification," and "investigated and responded that it could
 26 not assess the merits of the claim." (Order at 8.) In reaching this result, Magistrate Grewal accepted
 27 an explanation contained in a footnote in Google's memo of law in support of its motion to dismiss
 28 the AC (and renewed here at Mov. Br. at 3 & 5 n.3) that Google was "uncertain" whether the
 developer of Reptilicus.net Brutal Spy Phone was infringing on Plaintiff's mark are merely intended
 to use the mark as a "descriptor," and blamed Plaintiff for not following up to provide additional
 information. (Order at 8.) Notably, the notice Google sent to Plaintiff in June 2013 when it refused
 to act did not mention any "uncertainty" or "confusion," nor did it request additional information
 from Plaintiff. (SAC ¶ 85.)

(Continued...)

1 the authorities cited by Google support the notion that an online service provider can avoid liability
 2 for contributory infringement simply by responding to a notice of infringement, particularly where
 3 that response is inadequate, inconsistent with earlier responses and Plaintiff's SAC includes specific
 4 allegations plausibly suggesting why Google's response was different than before. (See SAC ¶¶ 68-
 5 94, 145-151.) If Google's view is accepted, then all a defendant needs to do to avoid liability is
 6 acknowledge receipt of a complaint and advise that nothing could be done, the law of contributory
 7 trademark infringement would have no teeth.⁸

8
 9 Another argument advanced by Google that is dispelled by the changes that appear in the
 10 SAC is Google's contention that Plaintiff's "failure to provide notice to Google of the allegedly
 11 infringing apps" is fatal to its claim for contributory infringement. (Mov. Br. at 4-5.) To the contrary,
 12 it is sufficient for the SAC to allege that Google was willfully blind to ongoing infringement, *i.e.*,
 13 that Google had "reason to suspect that users of its service [were] infringing a protected mark," but
 14 looked the other way. Acad. of Motion Picture Arts & Scis., 2015 WL 5311085 at *34; accord
 15 Tiffany, 600 F. 3d at 109-110. The allegations in the SAC go far beyond what Google has
 16 characterized as "generalized knowledge" of infringement. (Mov. Br. at 4.) Rather, the SAC alleges
 17 many new and additional facts the render plausible Plaintiff's contention that, even in the absence of
 18

19 _____
 20 ⁸ In downplaying the significance of Google's failure to take down Reptilicus.net Brutal Spy Phone,
 21 both Google and Magistrate Grewal relied on Lockheed Martin Corp. v. Network Sols., Inc., 985 F.
 22 Supp. 949, 963 (C.D. Cal. 1997), aff'd, 194 F.3d 980 (9th Cir. 1999) for the proposition that "[t]he
 23 mere assertion by a trademark owner that a domain name infringes its mark is not sufficient to impute
 24 knowledge of infringement." (Mov. Br. at 3, citing Order at 8 n.61.) That quotation is clearly
 25 inapplicable here, however. In Lockheed case, the district court held that merely registering a domain
 26 name that matched a trademark is not necessarily infringement. The court went on to explain that
 27 "to be infringing, such use must be in connection with goods or services that are competitive with,
 28 or at least related to, the goods or services for which the trademark has been registered or used in
 commerce" and [t]he use must also cause a likelihood of confusion as to origin or sponsorship" based
 on such factors strength of the mark, the proximity of the goods, the similarity of the marks,
 marketing channels used and the type of goods. 985 F. Supp. at 963 (citations omitted). Here, the
 developer of Reptilicus.net Brutal Spy Phone was using Plaintiff's mark in connection with a directly
 competing product in the exact same channel of trade.

(Continued...)

1 a specific notice of infringement directed towards a particular app, Google had reason to know about
 2 (but was willfully blind to) the massive infringement of Plaintiff's mark by other app developers on
 3 Google Play. For example, the SAC alleges that: (1) Plaintiff filed numerous trademark complaints
 4 with Google utilizing Google's online complaint form, placing the Google Play Team on notice of
 5 both Plaintiff's mark and Plaintiff's objection to use of the SPY PHONE® mark by others (SAC ¶¶
 6 68-69);⁹ (2) the same employee or small group of employees on the Google Play Team were
 7 responsible for handling all of the online complaints relating to Plaintiff's App and, therefore,
 8 regardless of whether Plaintiff submitted a trademark complaint or a spyware complaint¹⁰ directed
 9 towards a particular app, Google was made aware of apps that infringed on Plaintiff's mark by using
 10 SPY PHONE® in their names (SAC ¶¶ 30, 70, 119, 125); (3) since at least January 2015, each new
 11 app offered for listing in Google Play has been subject to a "human review" to ensure compliance
 12 with Google Play's Developer Program Policies, which means that Google knew the names of all
 13 infringing apps before they were listed on Google Play (SAC ¶ 30); and (4) Google regularly and
 14 routinely conducted independent monitoring of the apps listed on Google Play to ensure compliance
 15 with the DDA and Google Play's Developer Program Policies and, through those efforts, was aware
 16 of the apps that infringed on Plaintiff's mark (SAC ¶ 28). These allegations plausibly suggest that
 17
 18
 19

20 ⁹ See Evans v. Hewlett-Packard Co., No. C 13-02477 WHA, 2013 WL 4426359, at *2 (N.D. Cal.
 21 Aug. 15, 2013) (denying motion to dismiss where the allegations in the complaint were sufficient to
 22 permit an inference that defendants knew, or could have reasonably deduced that the owner of the
 mark did not consent to use by others).

23 ¹⁰ As described in the SAC, filing a trademark complaint using Google's online trademark complaint
 24 results in Google sending a notice identifying the complaining party to the infringer, which is how
 25 Ciuca and other developers were able to identify Plaintiff as the complaining party. (SAC ¶ 67, 78-
 26 82.) Preferring to remain anonymous, Plaintiff started sending complaints to Google about infringing
 27 apps asserting that these apps violated Google's prohibition against "spyware" (a program that could
 28 be used to view data on a mobile phone without the owner's knowledge), which does not trigger a
 notice identifying the complainant. (Id. ¶¶ 119, 125.) Google argues that Plaintiff's decision to stop
 sending infringement complaints and start sending spyware complaints is fatal to Plaintiff's assertion
 that Google had knowledge of trademark infringement. (Mov. Br. at 5-6.) But if, as Plaintiff alleges,
 investigation of and responses to complaints was done by the same employee or a small group of
 employees who were aware of Plaintiff's mark (SAC ¶ 70), the form of complaint providing actual
 notice to Google is not pertinent and the result should be the same.

1 Google was specifically aware of both Plaintiff's mark and that other developers were infringing on
 2 Plaintiff's mark, even in the absence of an explicit complaint about a particular app.

3 The allegations in the SAC go even further by alleging a motive for members of the Google
 4 Play Team to have turned a blind eye to instances of trademark infringement by other developers.
 5 As described in the SAC, Plaintiff alleges that members of the Google Play Team had a financial
 6 incentive to assist defendant Ciuca and other developers by removing Plaintiff's App from Google
 7 Play and terminating Plaintiff's developer account in retaliation for Plaintiff having filed trademark
 8 complaints. (SAC ¶¶ 86-94.) The plausibility of these allegations is further bolstered by the letter
 9 that Plaintiff received from someone identifying him/herself as a Google employee with first-hand
 10 knowledge of Plaintiff's history of complaints and subsequent suspensions, and who confirmed
 11 Plaintiff's belief that members of the Google Play Team were fully aware that Plaintiff's mark was
 12 being infringed and, to further their own financial interests, continued to allow those infringing
 13 developers to post infringing apps on Google Play. (SAC ¶¶ 146-151 & Exhibit 4.)¹¹ Although
 14 Google suggests that this letter need not be accepted as true because its author and provenance are
 15 not explicitly alleged (Mov. Br. at 2), at this stage of the case, the contents of the letter must be
 16 accepted as true. Talada v. City of Martinez, Cal., No. C 08-02771 WHA, 2009 WL 382758, at *8
 17 (N.D. Cal. Feb. 12, 2009) (plaintiff's allegations as to provenance of anonymous letters must be
 18 accepted as true on a motion to dismiss).
 19
 20

21 Simply put, given the extensive allegations in the SAC that plausibly support Plaintiff's
 22 contention that Google had knowledge of ongoing infringement by developers that Google continued
 23 to allow to operate on Google Play, Google's motion should be denied and Plaintiff should be
 24 permitted to take discovery to prove the allegations in the SAC. Gray v. BMW of North America,
 25
 26

27
 28 ¹¹ This letter, although not attached to the AC, is now included as Exhibit 4 to the SAC.

1 LLC, No. 13–cv–3417 (WJM)(MF), 2014 WL 4723161 at *3 (D.N.J. Sep. 23, 2014) (questions
2 concerning defendant’s knowledge “are properly to be determined through discovery, not on a
3 motion to dismiss”).

4
5 B. THE SAC STATES A CLAIM FOR TORTIOUS INTERFERENCE
6 WITH CONTRACT

7 With respect to Plaintiff’s claim for tortious interference against Google for interfering with
8 Plaintiff’s AdSense® contract, Plaintiff acknowledges the cases cited by Google which hold that a
9 party to a contract cannot be held liable for interfering with its own contract. (Mov. Br. at 6.) That
10 rule, however, should not be mechanically applied here because Plaintiff has alleged that Google’s
11 AdSense® program is operated by a business unit that is distinct and independent from the one that
12 employs the financially self-interested members of the Google Play Team who are alleged to have
13 interfered with the AdSense® contract. (SAC ¶ 56.) Applied Equip. Corp. v. Litton Saudi Arabia
14 Ltd., 7 Cal. 4th 503, 513-14 (1994) (“a stranger to a contract may be liable in tort for intentionally
15 interfering with the performance of the contract.” quoting Pacific Gas & Electric Co. v. Bear Stearns
16 & Co., 50 Cal. 3d 1118, 1126 (1990)).

17
18 C. THE SAC STATES A CLAIM FOR BREACH OF THE IMPLIED
19 COVENANT OF GOOD FAITH AND FAIR DEALING IN THE DDA

20 As Google acknowledges (Mov. Br. at 7), “every contract contains an implied covenant of
21 good faith and fair dealing.” Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459, 477 (1992). “A
22 ‘breach of a specific provision of the contract is not a necessary prerequisite’ to a breach of an implied
23 covenant of good faith and fair dealing.” Marsu, B.V. v. Walt Disney Co., 185 F.3d 932, 937 (9th
24 Cir. 1999) (quoting Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc., 2 Cal. 4th 342,
25 372 (1992)).

26
27 Seeking dismissal of Plaintiff’s claim for breach of the implied duty of good faith and fair
28 dealing in the DDA, Google contends that the SAC does not allege facts upon which Google can be

1 held liable because the actions taken by Google in removing Plaintiff's App and terminating its
 2 developer account fall within the scope of its "broad discretionary power to police its own website
 3 and to remove material that 'violates Google's hosting policies and other terms of service.'" (Mov.
 4 Br at 7.) However, even "when a contract gives one party a discretionary power affecting the rights
 5 of the other, that party must exercise its discretion in good faith and in accordance with fair dealing."
 6 Powerhouse Motorsports Grp., Inc. v. Yamaha Motor Corp., 221 Cal. App. 4th 867, 882 (2d Dist.
 7 2013); accord Carma Developers, 2 Cal. 4th at 372 ("The covenant of good faith finds particular
 8 application in situations where one party is invested with a discretionary power affecting the rights
 9 of another. Such power must be exercised in good faith"). Whether a party has acted in good faith
 10 is a question of fact. Peak-Las Positas Partners v. Bollag, 172 Cal. App. 4th 101, 106 (2nd Dist. 2009)
 11 (citing Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 488 (1985)).

12
 13 While Plaintiff does not dispute that Google retained the right under the DDA to determine
 14 whether an app violates one or more of its Developer Program Policies or some other term of service
 15 (Mov. Br. at 7), as reflected in the authorities cited above, Google must exercise that discretion in
 16 good faith. In other words, absent explicit contractual authority, Google cannot remove an app for
 17 no reason simply to advance its own agenda (or the agenda of its employees or another developer).
 18 Daly v. United Healthcare Ins. Co., No. 10-CV-03032-LHK, 2010 WL 4510911, at *6 (N.D. Cal.
 19 Nov. 1, 2010) (even though defendant retained right to terminate plaintiff, plaintiff stated claim for
 20 breach of implied covenant of good faith and fair dealing by alleging defendant did not investigate
 21 basis for termination and that termination was solely to avoid paying commissions). The SAC
 22 contains many detailed allegations that, if proven, would establish that Google's removal of
 23 Plaintiff's App from Google Play and the suspension its developer account was unjustified, done in
 24 bad faith and constituted an abuse of discretion. Most notably, the letter Plaintiff received from a
 25 Google insider explicitly states that the takedown of Plaintiff's App and the suspension of Plaintiff's
 26 developer account were entirely illegitimate, and the only reason that Plaintiff's account was
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 28

reinstated was that that “there was no real justification to get rid of [Plaintiff].” (SAC ¶ 147, Exhibit 4.) In addition, the SAC alleges that after Plaintiff’s App was removed from Google Play in 2013 because of a purported determination that it violated Google’s prohibition against “spyware,” Plaintiff’s App was reinstated without any change to its features and functionality, which further supports Plaintiff’s allegations that there was nothing wrong with it in the first place. (SAC ¶ 101)¹² Despite the fact that Google eventually acknowledged that the original takedown was unjustified, Google refused to restore the prior consumer reviews and download statistics for Plaintiff’s App, which contributed to its high search term ranking. (SAC ¶ 108.) The same thing happened again in 2014, when Plaintiff’s App was unjustifiably removed from Google Play based on a false complaint that it violated Google’s “anti-spam” policy. (SAC ¶¶ 131-136.) The SAC further alleges that Google’s so-called policy of prohibiting developers from using the word “spy” in the title of an app listed on Google Play, which precluded Plaintiff from using its trademark anywhere in the world, was abusive because it applied only to Plaintiff, (SAC ¶¶ 114, 124), a fact confirmed by the letter from the Google insider (SAC ¶ 147, Exhibit 4) and the continued presence of dozens of other apps that contain the word “spy” in its name. (SAC ¶¶ 116-118.) Each of these allegations, individually and in their totality, plausibly establish that Google has breached its duty to exercise the discretion granted to it under the DDA in good faith, and Plaintiff should be entitled to test those allegations in discovery.

Notably, while Google’s asserts that “[c]ourts cannot imply the covenant of good faith and fair dealing if it conflicts with the a contract’s express grant of discretionary power” (Mov. Br. at 6), Google has not identified any express provision in the DDA that conflicts with Google’s implied duty to act in good faith in applying its Developer Program Policies. Section 7.2 of the DDA, which

¹² “After numerous back-and-forth communications between Plaintiff’s counsel and Google’s in-house lawyer, the Google Play Team finally acknowledged that none of the functions or features of Plaintiff’s App violated Google’s extant anti-spyware policy or any of Google’s other Developer Program Policies.” (SAC ¶ 101.)

1 is the only section of the DDA referenced by Google (Mov. Br. at 7), is precisely the type of clause
 2 as to which California courts have held the implied duty of good faith to apply since it vests Google
 3 with discretion on how and when an app can be removed from Google Play.

4 D. PLAINTIFF HAS STATED A CLAIM UNDER CALIFORNIA’S UCL

5 The SAC also states a claim for violation of the UCL, found in California Business &
 6 Professions Code § 17200. The UCL prohibits, inter alia, any “unfair ... business act or practice.”
 7 “Section 17200 ‘borrows’ violations from other laws by making them independently actionable as
 8 unfair competitive practices.” Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1143
 9 (2003) (citing Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th
 10 163, 180 (1999)). In other words, as observed by Magistrate Grewal in granting Plaintiff leave to
 11 amend, to state a claim under the UCL, a plaintiff must allege “an independently wrongful act.”
 12 (Order at 9; see also Mov. Br. at 8.)

13 Plaintiff has met this requirement here. As stated immediately above, the SAC states a claim
 14 against Google for breach of the implied covenant of good faith, which courts have repeatedly held
 15 may be used “as a predicate for § 17200 liability.” Cortez v. Glob. Ground Support, LLC, No. 09-
 16 4138 SC, 2009 WL 4282076, at *2 (N.D. Cal. Nov. 25, 2009) (citing Gabana Gulf Distribution, Ltd.
 17 v. GAP Int’l Sales, Inc., No. C 06-02584 CRB, 2008 WL 111223, at *10 (N.D. Cal. Jan. 9, 2008)).
 18 As described at pp. 5-11, the SAC also states a claim for contributory trademark infringement under
 19 the Lanham Act, which can also be used as a predicate for UCL liability. Ferrington v. McAfee, Inc.,
 20 No. 10-CV-01455-LHK, 2010 WL 3910169, at *14-15 (N.D. Cal. Oct. 5, 2010).

21 E. PLAINTIFF HAS STATED A CLAIM FOR TORTIOUS INTERFERENCE
 22 WITH PROSPECTIVE ECONOMIC ADVANTAGE.

23 In addition to alleging the elements of a cause of action for interference with prospective
 24 economic advantage (see Mov. Br. at 8, citing Korea Supply, 29 Cal. 4th at 1153), a plaintiff must
 25 also plead that the defendant’s conduct was “wrongful by some legal measure other than the fact of
 26
 27
 28

interference itself.” Id. (citing Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 393 (1995)).

Similar to claims brought under the UCL, courts within the Ninth Circuit have held that a well-pled claim for breach of the covenant of good faith and fair dealing can constitute the “independent wrong” required to state a claim for tortious interference with prospective economic advantage. Darnaa, LLC v. Google, Inc., No. 15-CV-03221-RMW, 2015 WL 7753406, at *7 (N.D. Cal. Dec. 2, 2015) (“the requirement of “wrongful” conduct apart from the alleged interference itself will be met” by alleging breach of the covenant of good faith and fair dealing); Givemepower Corp. v. Pace Compumetrics, Inc., No. 07CV157 WQH RBB, 2007 WL 2345027, at *8 (S.D. Cal. Aug. 14, 2007) (the pleading requirement of independently wrongful conduct satisfied where plaintiff adequately alleged, among other claims, breach of the implied covenant of good faith and fair dealing).

Google attacks the viability of Plaintiff’s tortious interference claim on two grounds, neither of which has merit. First, Google contends that the independent wrong on which Plaintiff relies – breach of the covenant of good faith – is deficiently pled because Google retained the unfettered discretion to do as it pleased under the DDA. (Mov. Br. at 8-10.) As explained above at pp. 13-16, however, the implied covenant of good faith and fair dealing does not vanish simply because a contract gives one party discretionary power affecting the rights of the other. Indeed, the covenant of good faith “finds particular application” in these types of situations. Carma Developers, 2 Cal. 4th at 372. While Google argues that it “did nothing more than exercise its [superior] contractual rights under the DDA in taking down Plaintiff’s App and suspending its developer account (Mov. Br. at 9), the SAC contains specific allegations, discussed above at pp. 13-16, describing how Google did not merely exercise its rights, but abused them by taking punitive action against Plaintiff without justification. Simply stated, while it is true that Google is authorized under the DDA “to take down any app that Google has deemed to be spyware (Mov. Br. at 9), the SAC alleges that Plaintiff’s App

1 was taken down even though it was **not** spyware, and that Google did what it did without justification
 2 or a good faith belief that Plaintiff or Plaintiff's App violated any of Google's Developer Program
 3 Policies (SAC ¶¶ 90-94, 114-124), allegations that are supported by letter from the Google insider
 4 (SAC ¶¶ 146-151 and Exhibit 4), and the fact that Plaintiff's App was eventually reinstated without
 5 any change in functionality. (SAC ¶ 101.) Contrary to Google's characterization, these are not
 6 merely "conclusory assertions" of bad faith (Mov. Br. at 9), but specific and plausible allegations
 7 that Plaintiff should be permitted to test in discovery. Indeed, if either side has advanced allegations
 8 that could be described as conclusory, it is Google, who asks this Court to accept as true its assertion
 9 that Plaintiff's App was "spyware" and that it has not engaged in bad faith conduct. But on a motion
 10 to dismiss, it is Plaintiff's allegations that must be accepted as true, not the defendant's.

12 As a second prong of attack against Plaintiff's tortious interference claim, Google argues that
 13 Plaintiff has not "pled any recoverable damages" because Plaintiff's App is a free download and,
 14 further, the DDA precludes recovery of consequential damages and lost profits. (Mov. Br. at 10.)
 15 The SAC alleges, however, that Plaintiff has earned between 22.5¢ and 45¢ per download through
 16 advertising revenue, money that Plaintiff lost as a result of Google's misconduct. (SAC ¶¶ 53-54.)
 17 As for the limitations of damages clause found in § 12 of the DDA, the allegations in the SAC are
 18 sufficient to raise an issue as to whether § 12 is unconscionable and, therefore, not enforceable against
 19 Plaintiff. (See SAC ¶¶ 16, 21, 104); Rodman v. Safeway Inc., No. 11-CV-03003-JST, 2015 WL
 20 5117616 at *4 (N.D. Cal. Aug. 31, 2015) ("limitation of liability clauses are enforceable unless they
 21 are unconscionable, that is, the improper result of unequal bargaining power or contrary to public
 22 policy," quoting Food Safety Net Servs. v. Eco Safe Sys. USA, Inc., 209 Cal. App. 4th 1118, 1126
 23 (2012)); Clark v. LG Electronics U.S.A., Inc., No. 13-CV-485 JM JMA, 2013 WL 5816410 at *15
 24 (S.D. Cal. Oct. 29, 2013) (contractual provision precluding recovery of consequential damages not
 25 enforceable against weaker party where parties do not have equal bargaining power negotiation and
 26 the weaker party has no meaningful choice); see generally, Cal. Com. Code § 2719 (West)

(“Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable”); Cal. Civ. Code § 1668 (West) (“All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his . . . violation of law, whether willful or negligent, are against the policy of the law”). Enforcement of the limitation of damages clause here would be particularly anomalous since it would effectively insulate Google, the dominant player in the market for Android® apps (SAC ¶ 16), not just from claims for consequential damages, but from liability under any circumstances, regardless of the nature of the conduct alleged. Moreover, the DDA limitation should be interpreted to protect Google only from good faith acts taken in its own interest.

F. SECTION 230 OF THE CDA DOES NOT IMMUNIZE GOOGLE FROM LIABILITY HERE

Google also argues that § 230(c)(2)(A) of the Communications Decency Act (“CDA”), codified at 47 U.S.C. 230(c)(2)(A), immunizes Google from liability for its actions as a matter of law.¹³ This argument should be rejected for any or all of the following reasons: (1) the applicability of the CDA is not ripe for determination on a Rule 12(b)(6) motion; (2) Google does not fit the definition of an interactive service provider because it contributes to the content at issue; and (3) Google cannot demonstrate, as a matter of law, that it acted in good faith.¹⁴

1. CDA Immunity Cannot Be Determined on a Rule 12(b)(6) Motion

¹³ Section 230(c)(2)(A) provides that no civil liability may be imposed against an interactive computer service for

any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

¹⁴ Magistrate Grewal’s prior Order did not address the applicability of the CDA here. Plaintiff refers this Court to its prior memorandum on this issue.

As a threshold matter, this Court must decide whether CDA immunity, an affirmative defense, can even be raised on a Rule 12(b)(6) motion. e-ventures Worldwide, LLC v. Google, Inc., No. 2:14-CV-646-FTM-29CM, 2016 WL 2758889, at *5 (M.D. Fla. May 12, 2016) (“The CDA statutory immunity is an affirmative defense which plaintiff is not required to negate in its Complaint”); Perfect 10, Inc. v. Google, Inc., 2008 WL 4217837 at *8 (C.D. Cal. 2008) (“preemption under the CDA is an affirmative defense that is not proper to raise in a Rule 12(b)(6) motion.”); Swift v. Zynga Game Network, Inc., No. C 09-05443 SBA, 2010 WL 4569889 at *6 (N.D. Cal. Nov. 3, 2010) (same); but see Holomaxx Technologies v. Microsoft Corp., 783 F. Supp. 2d 1097, 1103 (N.D. Cal. 2011) (“an affirmative defense properly may be considered on a Rule 12(b)(6) motion where the defense is ‘apparent from the face of the [c]omplaint’”). If the Court determines that this defense cannot be considered on a pre-answer motion to dismiss, it need go no further.

2. Google Is Not Entitled To CDA Immunity Because It Is a Content Provider

By its terms, the CDA precludes publisher liability against an interactive computer service for content created by “another information content provider.” 47 U.S.C. § 230(c)(1). “In other words, the CDA immunizes an interactive computer service provider that ‘passively displays content that is created entirely by third parties,’ but not an interactive computer service provider that acts as an information content provider by creating or developing the content at issue.” Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc., 144 F. Supp. 3d 1088, 1093-94 (N.D. Cal. 2015) (quoting Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008)); accord, Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003) (“The reference to ‘another information content provider’... distinguishes the circumstance in which the interactive computer service itself meets the definition of ‘information content provider’ with respect to the information in question [emphasis in original]”).

The SAC alleges that “[b]efore an app can be listed on Google Play, the developer must incorporate source code provided by Google that enables the apps to access and interact with a

1 phone's Android® operating system.” (SAC ¶ 33.) Since it provides a portion of the content for all
 2 apps listed on Google Play, Google does not fit the definition of an interactive computer service and
 3 cannot rely on CDA § 230 to avoid liability. Opperman v. Path, Inc., 84 F. Supp. 3d 962, 987 (N.D.
 4 Cal. 2015) (denying Apple's motion to dismiss based on assertion of CDA immunity where the
 5 complaint alleged that all apps listed in Apple's App Store “were built, in part, by Apple” because
 6 “Apple controlled the development of Apps provided by its App Store, and contributed to the creation
 7 of the offensive content, for example, by using its iOS Human Interface Guidelines to instruct App
 8 developers to access address book data without prior permission”).

10 Google's contention that “numerous courts have held that Google Play and other Google
 11 online platforms are interactive computer services under the CDA” (Mov. Br. at 12) is misleading,
 12 since none of the cases cited by Google (Mov. Br. at 12) address the question of whether Google
 13 Play fits the definition of an interactive computer service under the CDA. Svenson v. Google Inc.,
 14 65 F. Supp. 3d 717, 726 (N.D. Cal. 2014) (examining whether Google's electronic payment service
 15 violates the Stored Communications Act); In re Google, Inc. Privacy Policy Litig., No. C-12-01382-
 16 PSG, 2013 WL 6248499, at *12 (N.D. Cal. Dec. 3, 2013) (examining whether Google services
 17 constitute “a wire or electronic communications service” as defined under the Stored
 18 Communications Act); Parker v. Google, Inc., 422 F. Supp. 2d 492, 500 (E.D. Pa. 2006), aff'd, 242
 19 F. App'x 833 (3d Cir. 2007) (examining whether Google's USENET system qualifies for CDA
 20 immunity); Jurin v. Google Inc., 695 F. Supp. 2d 1117, 1119 (E.D. Cal. 2010) (examining whether
 21 Google's search engine qualifies for CDA immunity); Mmubango v. Google, Inc., No. CIV.A. 12-
 22 1300, 2013 WL 664231, at *1 (E.D. Pa. Feb. 22, 2013) (same). At a minimum, the allegations
 23 describing the extent of Google's involvement in contributing to the apps posted on Google Play
 24 raise an issue that cannot be decided on a motion to dismiss. CYBERSitter, LLC v. Google Inc., 905
 25 F. Supp. 2d 1080, 1086 (C.D. Cal. 2012) (Because [Google's] entitlement to immunity under the
 26 CDA depends on whether [it] “developed” or materially contributed to the content of these
 27
 28

1 advertisements, including those Google is being paid to provide as search results, it is too early at
 2 this juncture to determine whether CDA immunity applies”).

3 4 3. Google Cannot Establish Good Faith at This Stage of the Action

5 As Google concedes (Mov. Br. at 14-15), to obtain CDA immunity, Google must also
 6 establish that it acted in “good faith” in removing Plaintiff’s App from Google Play. e-ventures
 7 Worldwide, 2016 WL 2758889 at *5 (denying Google’s motion to dismiss based on CDA immunity
 8 where plaintiff had alleged that Google failed to act in good faith when removing its websites from
 9 Google’s search results).¹⁵ Many of the allegations in the SAC already discussed above leave Google
 10 unable to demonstrate good faith as a matter of law. For example, Plaintiff has alleged that Plaintiff’s
 11 App fully complied with all Google’s policies and procedures and that there was no justification to
 12 remove Plaintiff’s App from Google Play or suspend its developer account. (SAC ¶¶ 90-92, 134-
 13 136.) Plaintiff has also alleged that it received a letter from a Google insider confirming Plaintiff’s
 14 own belief that Google had “no real justification” for the adverse actions taken against Plaintiff in
 15 2013 and 2014, and that such actions were taken to advance the personal interests of Google
 16 employees to punish Plaintiff for submitting complaints to enforce its legitimate trademark rights.
 17 (SAC at ¶ 147 and Exhibit 4.) The SAC further alleges that Google has no actual policy against
 18 using the word “spy” in the name of an app, and that Plaintiff was the only developer that Google
 19 had ever prevented from using the word “spy” in the name of its app (SAC at ¶ 124), an allegation
 20 that Plaintiff supports with a partial list of apps that contained the word “spy” in the name that were
 21 allowed to remain listed on Google Play after Plaintiff’s App had been removed. (Id. at ¶¶ 117-119;
 22 166-167.) Plaintiff also alleges that Google and its employees orchestrated the removal of Plaintiff’s
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26
 27 ¹⁵ Google asserts that Plaintiff has the burden of pleading an absence of good faith with respect to
 28 Google’s affirmative defense of CDA immunity. (Mov. Br. at 14.) Although it is illogical for Plaintiff to have to disprove an element of Google’s defense, as described below, the SAC contains ample facts that would establish Google’s bad faith conduct.

1 App from Google Play not because the content or functionality was “objectionable,” but because of
 2 an ulterior financial incentive. (*Id.* at ¶¶ 146-147.) At a minimum, these allegations are sufficient
 3 to raise a legitimate issue of whether Google is entitled to CDA immunity. Moving and Storage, Inc.
 4 v. Panayotov, No. 12–12262–GAO, 2014 WL 949830 at *2 (D. Mass. Mar. 12, 2014) (if bad faith is
 5 adequately pled, availability of CDA immunity defense “cannot be appropriately decided” on a Rule
 6 12(b)(6) motion absent “a developed factual record”).

7 The decision upon which Google most heavily relies in arguing that its good faith can be
 8 decided as a matter of law on a motion to dismiss is readily distinguishable. In e360Insight, LLC v.
 9 Comcast Corp., 546 F. Supp. 2d 605 (N.D. Ill 2008) (cited in Mov. Br. at 14, 15), the plaintiff, who
 10 the court described as a “spammer,” sued Comcast for failing to allow it to deliver bulk email
 11 messages through Comcast’s servers. The plaintiff alleged that Comcast had unfairly “singl[ed] out”
 12 plaintiff, and that others behaving in a like manner were treated differently. *Id.* at 609. Here, by
 13 contrast, while it is true that Plaintiff claims that has been treated differently than other developers
 14 who use are allowed to use the word “spy” in the name of their app (SAC ¶¶ 102-124), Plaintiff’s
 15 Complaint goes much further. Plaintiff alleges not only disparate treatment, but that Google’s
 16 employees orchestrated the removal of Plaintiff’s App from Google Play for their own personal
 17 financial gain. (SAC ¶¶146-151.) See also Smith v. Trusted Universal Standards in Electronic
 18 Transactions, Inc., Civ. No. 09–4567, 2010 WL 1799456 at * 7 (D.N.J. May 4, 2010) (allegation that
 19 defendant blocked email for financial motive, namely to encourage plaintiff to upgrade his service
 20 plan, satisfies the requirement of pleading bad faith). In addition, while the district court in
 21 e360Insight found that “a mistaken choice to block [the plaintiff’s emails], if made in good faith,
 22 cannot be the basis for liability” in light of the immunity afforded by § 230, e360Insight, 546 F. Supp.
 23 2d at 609, Plaintiff here does not just allege that Google made a mistake. Rather, Plaintiff asserts
 24 that Google knew, directly or through its employees, that “there was no real justification” for
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1 removing Plaintiff's App from Google Play and/or suspending Plaintiff's developer account, but did
 2 these anyway. (SAC ¶¶ 94, 147, 151 and Exhibit 4.) This is the very definition of bad faith behavior.

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 5 **IV. CONCLUSION**

6 For the foregoing reasons, Google's motion should be denied in all respects and the action
 7 should proceed to discovery.
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9
 10 Dated: July 15, 2016

RIMON P.C.

11
 12 By: /S/ Neil A. Smith
 13 Neil A. Smith

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CERTIFICATE OF SERVICE

I, Neil A. Smith, hereby certify that on July 15, 2016 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Neil A. Smith

NEIL A. SMITH